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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

FACEBOOK, INC.,

Case No. 5:08-cv-05780 JW (JCS)

Plaintiff,

**FACEBOOK, INC.'S SUPPLEMENTAL
BRIEF REGARDING DAMAGES AND
LIABILITY OF DEFENDANT STEVE
VACHANI**

v.

POWER VENTURES, INC., a Cayman Island
corporation; STEVE VACHANI, an individual;
DOE 1, d/b/a POWER.COM, DOES 2-25,
inclusive,

Dept: Courtroom 9, 19th Floor
Judge: Hon. Chief Judge James Ware

Defendants.

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1 **I. INTRODUCTION**

2 On February 16, 2012, this Court granted Facebook, Inc.'s Motions for Summary
 3 Judgment on all counts, leaving the following issues to be briefed and decided: (1) the amount of
 4 damages Facebook should receive in light of the Court's Order; and (2) the individual liability of
 5 defendant Steve Vachani. Dkt. No. 275 at 19.

6 Facebook is entitled to the maximum statutory damages under the CAN-SPAM Act, as
 7 well as compensatory and punitive damages and injunctive relief, for Power's and Vachani's
 8 violations of CAN-SPAM, CFAA, and Penal Code Section 502. Moreover, Vachani is
 9 individually liable for such damages as a result of his personal involvement in – indeed, direction
 10 of – the wrongful acts giving rise to liability. Accordingly, the Court should find both Power and
 11 Vachani liable for \$18,238,643 in damages, declare that Facebook is entitled to injunctive relief
 12 against both parties enjoining them each from engaging in further violations of the statutes and
 13 Facebook's Terms of Use, and order an award of any punitive damage the Court finds
 14 appropriate. Thereafter, Facebook will submit a proposed form for the Judgment and Permanent
 15 Injunction.¹

16 **II. FACEBOOK SHOULD BE AWARDED \$18,238,643.**

17 **A. Maximum Damages Should Be Applied.**

18 The Court has broad discretion to determine an appropriate damages award under the
 19 CAN-SPAM Act. A provider of internet access services is entitled to up to \$100 per each

21 ¹ Facebook already is entitled to injunctive relief enjoining Power and Vachani from further
 22 violations of the CAN-SPAM Act, CFAA and Penal Code Section 502 as a result of their
 23 adjudicated violations of those statutes. See 18 U.S.C. § 1030(g); 15 U.S.C. § 7706(g)(1); Cal.
 24 Penal Code § 502(e)(1). Cf. *FTC v. Flora*, No. SACV11-00299-AG-(JEMx), 2011 WL 4888823
 25 (C.D. Cal. Aug. 16, 2011) (Court enters detailed permanent injunction against defendant found to
 26 violate CAN-SPAM Act, including imposing monitoring, reporting, and record-keeping
 27 requirements, as well as precluding future entities under the control of the defendant from
 28 engaging in conduct violating the statute). Facebook asks that the Court permit Facebook to
 submit its proposed permanent injunction and any application for attorneys once the Court
 resolves the two issues of "the amount of damages" and Vachani's individual liability. Dkt. No.
 275, at 19. Likewise, Facebook is entitled to file a separate application for its attorneys' fees
 and costs as a result of the Court's ruling that Power and Vachani are liable for violations of the
 CAN-SPAM Act, and California Penal Code Section 502. 15 U.S.C. § 7706(g)(4); Cal. Penal
 Code § 502(e)(2).

1 message sent in violation of the CAN-SPAM Act. *See* 15 U.S.C. § 7706(g)(3)(i).² Under the
 2 facts of this case, Facebook is entitled to receive the maximum statutory award of \$100 for each
 3 of the spam messages that Defendants caused to be sent to Facebook users, and to thereby recover
 4 at least \$18,188,100.

5 Courts look to the nature of the defendant's activity to decide whether to award the
 6 maximum amount. *See e.g. Facebook, Inc. v. Wallace*, No. C09-798 JF (RS), 2009 WL 3617789
 7 (N.D. Cal. Oct. 29, 2009); *Facebook, Inc. v. Fisher*, No. C09-05842 JF (PSG), 2011 WL 250395
 8 (N.D. Cal. Jan. 26, 2011); *Yahoo! v. XYZ Companies*, No. 08 Civ. 4581 (LTS)(THK), 2011 WL
 9 6072263 (S.D.N.Y. Dec. 5, 2011); *MySpace, Inc. v. Wallace*, No. CV 07-1929-ABC (AGR),
 10 2008 WL 1766714 (C.D. Cal. May 29, 2008); *Facebook, Inc. v. Guerbuez*, No. C08-03889, 2008
 11 U.S. Dist. LEXIS 108921 (N.D. Cal. Nov. 21, 2008).³

12 Here, Defendants initiated *at least* 60,627 unlawful messages to Facebook's users.⁴ Three
 13 facts warrant the imposition of the maximum statutory award in this case: 1) Defendants used
 14 cash payments to induce third parties to send deceptive electronic messages, 2) Defendants relied
 15 upon automated harvesting of personal information to create lists that they used to further their
 16 campaigns, and 3) Defendants destroyed evidence necessary to establish exactly how many
 17 messages, above the 60,627, they initiated.

18 1. **Defendants Acted With Culpable Intent.**

19 This Court has already determined that Defendants are liable for violating 15 U.S.C. §
 20 7704(a)(1) because they initiated "a minimum of 60,000 instances of spamming." Dkt. No. 275,
 21 at 9. Defendants' behavior runs afoul of a core purpose of 15 U.S.C. § 7704(a)(1)(A), which
 22 Congress enacted "to eliminate the use of inaccurate originating email addresses that disguise the
 23 identities of the senders," (Sen. Rep. No. 108-102, at 17 (2003)) and warrants the imposition of

24

² Under the statute, each message is considered a separate violation. *Id.*

25 ³ A copy of the November 21, 2008 *Guerbuez* order concerning CAN-SPAM liability is attached
 26 to the Declaration of Monte Cooper in Support of Facebook, Inc.'s Supplemental Brief Regarding
 27 Damages and Liability of Defendant Steve Vachani ("Cooper Decl.") as Exhibit ("Ex.") 1
 28 (11/21/08 *Guerbuez* Order).

⁴ Declaration of Ryan McGeehan in Support of Facebook's Motion for Partial Summary
 Judgment on Count 1 Under the CAN-SPAM Act ("McGeehan Decl.") ¶ 12 Dkt. No. 213-4. *See*
 also Dkt. No. 275, at 9.

1 the maximum statutory penalty.

2 The maximum statutory penalty is reserved for egregious spamming activity, such as
 3 Defendants' deceptive use of monetary payments to enable them to conceal their identity,
 4 compromise user data, and send commercial email under the guise of friendly invitations. *See*
 5 *MySpace, Inc. v. Wallace*, 2008 WL 1766714, at *5 (MySpace awarded \$223 million in statutory
 6 damages against a defendant who had sent nearly 400,000 messages and posted comments from
 7 "hijacked" user accounts); *Facebook, Inc. v. Guerbuez*, No. C08-03889 (Cooper Decl. Ex. 1), slip
 8 op. at 1 (ultimately awarding Facebook approximately 897 million dollars for aggravated
 9 violations of the CAN-SPAM Act).

10 In this case, Defendants' actions were egregious. Defendants designed their spamming
 11 campaign to ensure that it would continue notwithstanding any actions Facebook took to stop it.
 12 Dkt. 275 at 15-17. *See also* Cooper Decl. Ex. 2 (3/7/12 Power Depo. Tr.) at 146:16-148: 15; Ex.
 13 3 (12/1/08 email from S. Vachani to F. Herrera); Ex. 4 (12/2/08 email from S. Vachani to E.
 14 Santos).⁵ Defendants established their website link to Facebook in secret, and designed their
 15 system to purposefully circumvent Facebook security measures. Cooper Decl. Ex. 2 (3/7/12
 16 Power Depo. Tr.) at 146:16-148: 15; Ex. 5 (12/29/08 email chain from A. Fernandes to E. Cruz;
 17 Ex. 6 (1/3/09 email from F. Herrera to S. Vachani); Ex. 7 (1/4/09 email from S. Vachani to M.
 18 Ross); Ex. 8 (12/1/08 Power Press Release). They tailored their campaign to maximize the
 19 number of Facebook users who would be solicited to join Power, and offered monetary payment
 20 for access to their accounts. Dkt. 275 at 2-3, 10-12. *See also* Cooper Decl. Ex. 9 (11/26/08
 21 email from E. Santos to B. Carvalho). Once they had access, they created messages promoting
 22 their service and ran a script that sent those messages to the users' friends. Dkt. 275 at 2-3, 10-
 23 12. These messages originated from the affected Facebook user accounts, and were sent through
 24 Facebook's servers. *Id.* at 2-3, 10-14. As the Court found, Defendants "created a software
 25 program specifically designed to" disguise Defendants' access. *Id.* at 11.

26

27

28 ⁵ Certified translations are provided with emails and other exhibits written in Portuguese.

2. **Defendants Destroyed Evidence Of The Number of Deceptive Messages Sent.**

Defendants' destruction of critical evidence related to their spamming activities also supports imposition of the maximum penalty. [REDACTED]

Cooper Decl. Ex. 10 (12/14/2008 email from B. Carvalho to S. Vachani, with attached estatisticas.xlsx spreadsheet). The same documents reflect that as of December 11, 2008, [REDACTED]

Id. Other Power documentation reflects that as of

Cooper Decl. Ex. 11 (12/26/08 email chain from E. Santos to S. Vachani, with E. Cruz statistics). If each of these Facebook users participated in the Power 100 campaign resulting in Power sending invitations to 100 of their friends, Power would have sent 4,341,200 spam messages – far more than the 60,627 confirmed messages sent by Power. In fact, in March of 2009, after this lawsuit was filed, [REDACTED]

Cooper Decl. Ex.

Significantly, though, Defendants admit after this lawsuit was filed in December of 2008, they never instructed Power’s employees to maintain or preserve any potentially relevant documents related to their activities with Facebook, including database information associated with the Power 100 Campaign. *See* Cooper Decl. Ex. 12 (7/20/11 Vachani Depo. Tr.) at 271:9-272:5; Ex. 14 (1/9/12 Power Depo. Tr.) at 168:11-22. As a result, whatever information Power was using to track activity related to the Power 100 Campaign and to determine how many invitations were sent by its PowerScript software has been lost, to the severe prejudice of Facebook.

Specifically, in the fall of 2011, Facebook's source code expert determined that either an

1 [REDACTED]
 2 [REDACTED]
 3 [REDACTED] Dkt. No. 217, Melling Decl. at ¶¶ 31-33.
 4 For instance, Facebook's expert determined that the [REDACTED]
 5 [REDACTED]
 6 [REDACTED]
 7 [REDACTED] *Id.* at ¶¶ 33-34. D [REDACTED]
 8 [REDACTED]
 9 [REDACTED]
 10 [REDACTED] *Id.* at ¶ 32. Likewise, all of the logs in the Power_Logger database
 11 from December of 2008 had been deleted – despite their obvious relevance to this case. *Id.* at ¶
 12 34. [REDACTED]
 13 [REDACTED]
 14 [REDACTED] Cooper Decl.
 15 Ex. 14 (1/9/12 Power Depo. Tr.) at 79:14-21; 79:19-23; 83:20-84:17; Ex. 15 (4/24/11 Email
 16 string from E. Santos to S. Vachani).

17 In that regard, Facebook learned through discovery that in April of 2011, Defendants
 18 deleted the [REDACTED] effectively depriving Facebook of the ability to fully
 19 evaluate and document the extent of Defendants' intrusions and use of Facebook's systems
 20 between December 1, 2008 and December 30, 2008 as part of the Power 100 Campaign, or
 21 determine what means Defendants' used to mask that activity. Although it is undisputed such
 22 information existed at least in March of 2009, whatever data was used internally by Power to
 23 determine the number of daily invitations sent and initiated by the PowerScript software as part of
 24 the Power 100 campaign has been lost. Defendants' failure to preserve the relevant information
 25 from either the [REDACTED] is particularly egregious. Not only
 26 would that database information have shown that the combined number of illegal messages
 27 actually sent by Power using its PowerScript software likely significantly exceeds the 60,627
 28 confirmed messages sent solely in conjunction with Facebook Events (*see* McGeehan Decl. at

1 ¶12; Dkt. No. 217, Melling Decl. at ¶¶ 33-34), but Facebook has evidence showing [REDACTED]
 2 [REDACTED]
 3 [REDACTED]
 4 [REDACTED] Cooper Decl. Ex. 16 (11/24/10 email chain from B. Carvalho to S.
 5 Vachani).

6 As Power's Chief of Legal Operations noted to Defendant Vachani in a January 3, 2009
 7 email discussing the company's potential liability to Facebook owing for such CAN-SPAM
 8 violations, [REDACTED]
 9 [REDACTED]

10 [REDACTED] Cooper Decl. Ex. 17 (1/3/09
 11 email between F. Herrera and S. Vachani).

12 Despite Defendants' destruction of evidence, Facebook has established that Defendants
 13 initiated at least 60,627 messages through Facebook's systems in connection with one of their
 14 campaigns. McGeehan Decl. at ¶ 12. Defendants concede they initiated at least that many.
 15 Cooper Decl. Ex. 18 (2/24/12 Hg. Tr.) at 6:7-20. Because there are likely tens of thousands of
 16 additional messages that Defendants littered through Facebook that cannot be accounted for in the
 17 damages calculation thanks to Defendants' spoliation of the relevant database information,
 18 Facebook submits that the Court should apply the maximum statutory amount of \$100 for each
 19 message established on the evidence available.

20 **B. Facebook Is Entitled To Aggravated Damages.**

21 In addition to awarding the maximum statutory amount, the Court should treble damages
 22 against Defendants. A court may treble damages where (1) the court determines that the
 23 defendant committed the violation willfully and knowingly; or (2) the defendant's unlawful
 24 activity included one or more of the aggravated violations in §7704(b), such as directory
 25 harvesting. 15 U.S.C. § 7706(f)(3)(C). Directory harvesting constitutes an "aggravated
 26 violation" where:

27 the electronic mail address of the recipient was obtained using an
 28 automated means from an Internet website or proprietary online
 service operated by another person, and such website or online

1 service included, at the time the address was obtained, a notice
 2 stating that the operator of such website or online service will not
 3 give, sell, or otherwise transfer addresses maintained by such
 4 website or online service to any other party for the purposes of
 5 initiating, or enabling others to initiate, electronic mail messages[.]

6 15 U.S.C. § 7704(b)(1)(i). Defendants conduct falls within the purview of these provisions.
 7

8 **a. Defendants Engaged In Directory Harvesting.**

9 Defendants' conduct warrants aggravated damages because Defendants engaged in
 10 automatic directory harvesting. *Asis Inst. Svcs. v. Rausch*, No. 08-03186 EDL, 2010 U.S. Dist.
 11 LEXIS 42952, *25-28 (N.D. Cal., May 3, 2010) (awarding trebled damages under the CAN-
 12 SPAM Act where Defendants used directory harvesting to obtain Plaintiff's users' email
 13 addresses in order to spam them and where the Plaintiff's terms of use prohibited such activity).
 14 There is no dispute that, consistent with Section 7704(b), Facebook's Terms of Use available
 15 from its website and in effect on December 1, 2008 prohibited parties like Power from
 16 "harvest[ing] or collect[ing] email addresses or other contact information of other users from the
 17 Service or Site by electronic or other means for the purposes of sending unsolicited emails or
 18 other unsolicited communications." Cooper Decl. Ex. 19 (Facebook's Terms of Use). Likewise,
 19 there is no dispute that Defendants engaged in automatic directory harvesting as defined by the
 20 CAN-SPAM Act, and Power's Director of Legal Operations fully admitted in a December 4,
 21 2008 internal email discussing Facebook's original Cease and Desist Letter that [REDACTED]
 22 [REDACTED] Cooper Decl. Ex. 20 (12/4/08 email from F. Herrera
 23 to S. Vachani).

24 Specifically, Defendants used the credentials of affected users to gain access to all their
 25 friends' contact details and to send messages to those contacts. For example, one of Defendants'
 26 automated scripts, [REDACTED]
 27 [REDACTED] Melling
 28 Decl. ¶ 19. [REDACTED]
 29 [REDACTED]
 30 [REDACTED] *Id.* [REDACTED]

1 [REDACTED] Cooper Decl. Ex. 21 at Power's Responses to
 2 Facebook's First Set Requests for Admissions Nos. 15, 18, 22, 37, 43-44, 50, 54-56; Ex. 12
 3 (7/20/11 Vachani Depo. Tr.) at 182:16-186:2; 191:5-192:18; 197:4-8; 199:10-15; 203:4-18.

4 b. **Defendants Knowingly And Willfully Sent Deceptive Messages**
 5 **To Facebook Users.**

6 It is difficult to imagine a situation where the knowing and willful intent to pollute a
 7 provider's network could be better demonstrated. As established in Facebook's Motion for
 8 Summary Judgment (Dkt. No. 213), Defendants knowingly and willfully transmitted spam
 9 messages to Facebook users via software specifically designed to harvest addressing information.
 10 See Cooper Decl. Ex. 12 (7/20/11 Depo. Tr.) at 181:21-186:2, 197:9-12; 203:19-204:7; 205:12-
 11 206:22, 207:9-208:14; 212:19-213:4; 256:8-257:10; 257:22-258:11; 259:20-260:1; 261:23-262:5;
 12 263:14-264:12; 266:7-21; 273:6-274:10; Melling Decl. ¶¶ 3, 11, 19. [REDACTED]

13 [REDACTED]
 14 [REDACTED] Cooper Decl. Ex. 14 (1/9/12 Power
 15 Depo. Tr.) at 121:24-122:1; 122:19-20; 125:4-23; 126:1-23; 236:7-9; 239:20-24; 249:12-16;
 16 279:24-280:4; 346:7-11. [REDACTED]

17 [REDACTED]
 18 [REDACTED] Dkt. No. 217, Melling Decl. ¶¶
 19 11, 13; Cooper Decl. Ex. 22 at Supplemental Response to Interrogatory No. 7; Ex. 23 (12/1/08
 20 Cease and Desist Letter); Ex. 20 (12/4/08 email from F. Herrera to S. Vachani); Ex. 17 (1/3/09
 21 email from F. Herrera to S. Vachani). [REDACTED]

22 [REDACTED] Cooper Decl. Ex. 24 (POWER
 23 2011.02.03.0000089). They later made repeated modifications to their server systems to address
 24 Facebook's blocks, even though they were aware that Facebook objected to their activities.
 25 Cooper Decl. Ex. 5 (12/29/08 email chain from A. Fernandes to E. Cruz). They also elected not
 26 to seek the advice of counsel as to whether their conduct violated CAN-SPAM and other laws,
 27 even though their Director of Legal Operations repeatedly urged them to do so. Cooper Decl. Ex.

1 20 (12/4/08 email from F. Herrera to S. Vachani); Ex. 17 (1/3/09 email chain from F. Herrera to
 2 S. Vachani); Ex. 2 (3/7/12 Power Depo. Tr. at 101:20-102:19).

3 Accordingly, the Court should exercise its discretion to treble the statutory damages award
 4 against Defendants under 15 U.S.C. § 7706(f)(3)(C), and award Facebook at least \$18,188,100 in
 5 damages under the CAN-SPAM Act.⁶

6 **C. Facebook Is Entitled To Compensatory And Punitive Damages For**
Defendants' Violations of Section 502 And CFAA.

7 1. **Compensatory Damages Should Be Awarded Under Both Computer**
Trespass Statutes.

8 As the Court held, Facebook “provided uncontradicted evidence of the costs [,well in
 10 excess of the \$5000 CFAA threshold,] of attempting to thwart Defendants’ unauthorized access
 11 into its network.” Dkt. No. 275 at 18. These damages include the costs associated with
 12 “responding to the offense, conducting a damage assessment, and restoring the data, program,
 13 system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or
 14 other consequential damages incurred because of interruption of service.” Dkt. No. 275 at 18
 15 citing 18 U.S.C. § 2030(e)(11).

16 California Penal Code Section 502 specifies that “the owner or lessee of the computer,
 17 computer system, computer network . . . who suffers damage or loss by reason of a violation of
 18 any of the provisions’ of subdivision (c)” may seek compensatory damages. Cal. Penal Code §
 19 502(e)(1). Compensatory damages include “any expenditure reasonably and necessarily incurred
 20 by” Facebook verify the damage occasioned by Defendants’ violations. *Id.* Under the CFAA,
 21 Facebook is entitled to “compensatory damages and injunctive relief or other equitable relief.”
 22 18 U.S.C. § 1030(g).

24 _____
 25 ⁶ As noted, Facebook pursuant to 15 U.S.C. § 7706((g)(1) also is entitled to have the Court
 26 declare that it should received a permanent injunction enjoining Power and Vachani from further
 27 violations of the CAN-SPAM Act and Facebook’s Terms of Use. *Cf. Facebook, Inc. v. Fisher*,
 2011 WL 250395 at *3 (entering permanent injunction against Defendants under both the CAN-
 SPAM Act and CFAA whereby the Defendants were “permanently enjoined from accessing and
 abusing Facebook services”).

1 Facebook has established through undisputed testimony from both fact and expert
 2 witnesses that it expended at least [REDACTED] for, among other things, internal and external
 3 investigations and implementing technical measures. *See* Cooper Decl. Ex. 25 (Expert Report of
 4 Richard Ostiller) at 3-4; *see also* McGeehan Decl., ¶¶ 7-18; Cutler Decl., ¶ 15. As this Court
 5 noted, “Defendants do not dispute the accuracy or veracity of [the] evidence of [Facebook’s]
 6 expenditures.” Dkt. No. 275 at 8. Facebook should be entitled to recover its expenditures, as
 7 detailed in the Expert Report of Richard Ostiller.⁷ Cooper Decl. Ex. 25, at 3-4.⁸

8 2. **Punitive Damages Should Be Awarded Under California Penal Code**
 9 **Section 502.**

10 Facebook is entitled to punitive damages. Cal. Penal Code § 502(c)(4) citing Cal. Civil
 11 Code § 3294. California Civil Code Section 3294 authorizes punitive damages where “the
 12 defendant has been guilty of oppression, fraud, or malice.” Cal. Civil Code § 3294(a). In the
 13 case of “fraud,” punitive damages may be based on the “intentional misrepresentation, deceit, or
 14 concealment of a material fact known to the defendant with the intention on the part of the
 15 defendant of thereby depriving a person of property or legal rights or otherwise causing injury.”
 16 Cal. Civil Code § 3294(c)(3). Such awards are expressly “for the sake of example and by way of
 17 punishing the defendant.” Cal. Civil Code § 3294(a). In light of Defendants’ activities, punitive
 18 damages are warranted.

19 The undisputed evidence shows that Defendants sought to conceal their efforts to access
 20 Facebook’s servers and scrape user data. Dkt. No. 275 at 16 (“we also need to do some planning
 21 to make sure that we do it in a way where we are not really detected. . . .”). And, as this Court

22 ⁷ Facebook served Mr. Ostiller’s expert report on Defendants on December 19, 2011, pursuant to
 23 this Court’s Scheduling Order. Defendants did not serve a rebuttal report or file a Motion
 24 challenging Mr. Ostiller’s findings. Thus, they are uncontradicted.

25 ⁸ As with its claims under the CAN-SPAM Act, Facebook pursuant to 18 U.S.C. § 1030(g);
 26 15 U.S.C. § 7706(g)(1) and Penal Code § 502(e)(1) is entitled to have the Court declare that it
 27 should receive a permanent injunction enjoining Power and Vachani from further violations of
 the CAN-SPAM Act and Facebook’s Terms of Use. *See Tagged, Inc. v. Does 1 Through 10*, No.
 C 09-01713 WHA, 2010 WL 370331, at *12 (N.D. Cal. Jan 25, 2010) (entering permanent
 injunction against defendant under both the CFAA and Penal Code Section 502, where defendant
 had been shown “to circumvent plaintiff’s security measures”).

1 found, Defendants' activities caused Facebook injury. *Id.* at 14. These facts support a punitive
 2 award. *Cf. BMW of N. Am. v. Gore*, 517 U.S. 559, 579 (1996) (suggesting that evidence of
 3 "deliberate false statements, acts of affirmative misconduct, or concealment of evidence of
 4 improper motive" can support an award of punitive damages)

5 In addition to Defendants' attempts to conceal their activity so as to go undetected,
 6 Defendants' post-litigation efforts to hide evidence of their wrongdoing further supports a
 7 punitive damages award. For the better part of a year, Defendants refused to produce relevant
 8 documents and repeatedly misrepresented the status of their document production. Defendants
 9 filed papers with this Court adamantly denying any relevant documents, beyond the 13 that they
 10 produced in February 2011, existed. After numerous motions to compel were granted by the
 11 Court (*see* Dkt Nos. 127, 166), Defendants produced more than 300,000 emails in November
 12 2011. Then, after discovery closed in January 2012, and despite the Court's earlier order that
 13 they produce all responsive documents, Defendants produced an additional 75,457 files on
 14 January 25, 2012.⁹ Given the volume of this newly-produced data, it was not until after
 15 Facebook's motion for summary judgment was granted that Facebook uncovered in Defendants'
 16 production hundreds of documents highly relevant to Facebook's claims. Indeed, some of the
 17 documents, which had not previously been produced, essentially admitted liability. *See, e.g.*,
 18 Cooper Decl. Exs. 4, 20, 26, 5, 17 (12/2/08 email chain from S. Vachani to E. Santos; 12/4/08
 19 email from F. Herrera to S. Vachani; 12/16/08 email from D. Delgado to E. Santos; 12/29/08
 20 email chain from A. Fernandes to E. Cruz; 1/3/09 email chain from F. Herrera to S. Vachani).
 21 *See also* Cooper Decl. Exs. 27-29 FBPOWER434-436; 437-439; 499-501; Ex. 30 (12/12/08 email
 22 from J. Shapiro to S. Vachani), Ex. 31 (8/11/05 Chat conversation, S. Vachani email), Ex. 32
 23 (9/12/05 P. King email to S. Vachani), Ex. 33 (11/09/06 email from E. Santos to Kiran
 24 Inampudi).

25 Among the 74.6 gigabytes of recently produced documents is an email chain that included
 26

27 ⁹ The late production of this and other emails resulted in Magistrate Judge Spero entering
 28 sanctions against Defendants, which included their paying Facebook's costs and attorneys fee for
 appearing at a Court-ordered deposition of Defendant Power held on March 7, 2012. *See* Dkt.
 No. 282.

1 Vachani where Defendants' [REDACTED]
 2 [REDACTED]
 3 [REDACTED] Cooper Decl. Ex. 5 (12/29/08 email chain from A.
 4 Fernandes to E. Cruz). [REDACTED]
 5 [REDACTED]
 6 [REDACTED]
 7 [REDACTED]
 8 [REDACTED]
 9 [REDACTED]

10 [REDACTED] *Id.* Clearly, the email chain was relevant to Facebook's Penal Code Section
 11 502 and CFAA claims.

12 This new email chain also raises serious concerns about the candor of Defendant Vachani,
 13 who in two separate Declarations filed in conjunction with the parties' summary judgment papers
 14 averred that "At some time during December of 2008 Facebook began blocking one of the IP
 15 addresses Power had used," but "Power did not undertake any effort to circumvent that
 16 block, and did not provide users with tools designed to circumvent it." Dkt. No.98-2, ¶11
 17 (emphasis added); Dkt. No. 189, ¶¶10- 11. When confronted with the email chain, which showed
 18 Power's [REDACTED]
 19 [REDACTED]
 20 [REDACTED]
 21 [REDACTED] Decl. Ex. 2 (3/7/12 Power Depo. Tr. at 161:21-
 22 162:3. *See also id.* at 153:15-161:20; 164:12-165:4. Vachani also could not offer any
 23 explanation why the email chain had never previously been produced in the litigation, given that
 24 he himself was copied on it and at earlier depositions he swore he had produced all documents
 25 related to Facebook's blocking of the Power website. Cooper Decl. Ex. 2 (3/7/12 Power Depo.
 26 Tr. at 158:3-159:21). Such inexplicable lack of candor by Defendants about a core issue of the
 27 underlying claims is the quintessential example of litigation misconduct and the "intentional
 28 misrepresentation, deceit, or concealment of a material fact known to the defendant with the

1 intention on the part of the defendant of thereby depriving a person of property or legal rights or
 2 otherwise causing injury.” Cal. Civil Code § 3294(c)(3). *Cf. Notrica v. State Compensation Ins.*
 3 *Fund*, 70 Cal. App. 4th 911, 947-48 (1999) (“All that is required [to support a finding of fraud
 4 within the meaning of California Civil Code Section 3294] is that the fraud must equate to the
 5 conduct which gives rise to liability – in this case bad faith”).

6 Another one of the recently produced emails that also underscores why punitive damages
 7 are warranted is dated December 2, 2008—the day after receiving Facebook’s cease and desist
 8 letter—in which Power’s Chief Technology Officer Eric Santos told Vachani that he [REDACTED]

9 [REDACTED] Cooper Decl. Ex. 4 (12/2/08 email chain from
 10 S. Vachani to E. Santos). In response, Vachani states, [REDACTED]

11 [REDACTED] *Id.* Later, in another of the recently produced emails, [REDACTED]
 12 [REDACTED] Cooper
 13 Decl. Ex. 26 (12/16/08 email chain from D. Delgado to E. Santos).¹⁰ Clearly, all of these emails
 14 again were highly relevant to Facebook’s claims, and both collectively and individually utterly
 15 refute Defendants’ arguments that they made no effort to circumvent Facebook’s technical
 16 measures after (1) notice that their activity was prohibited and (2) after technical measures were
 17 in place. Yet, as noted, Defendants have been unable or unwilling to explain why they were not
 18 located or produced long before January 25, 2012. Cooper Decl. Ex. 2 (3/7/12 Power Depo. Tr.
 19 at 158:3-159:21).

20 As a result of Defendants’ ongoing concealment, Facebook was prevented from using
 21 highly relevant evidence to further establish the full extent of Defendants’ liability. Defendants’
 22 ongoing deceptive activity is precisely the type of egregious behavior that warrants punitive
 23 damages. For these reasons, Facebook is entitled to recoup the actual and punitive damages
 24 arising from Defendants’ unlawful access of the Facebook website. Facebook leaves it to the
 25 Court’s discretion as to the appropriate amount of punitive damages.

26 _____
 27 ¹⁰ Facebook has not yet received the certified translation for this email. However, Vachani, who
 28 is fluent in Portuguese, himself admitted Facebook’s understanding of its content was accurate.
 Cooper Decl. Ex. 2 (3/7/12 Power Depo Tr.) at 178:2-20, 180:1-20.

1 **III. VACHANI IS PERSONALLY LIABLE.**

2 As discussed in Facebook's summary judgment briefing (Dkt. No. 213), Defendant
 3 Vachani, is equally liable with Power Ventures because he directed and authorized all of the
 4 activity giving rise to liability to a degree that reflects far more than his supervisory role of the
 5 company as CEO. *See, e.g.*, Dkt. 213, at 22. The evidence establishes Vachani's personal
 6 involvement in authorizing, directing, and participating in Power's unlawful activities.
 7 Defendants have never contested this fact. In fact, Defendants admit in pleadings with this Court
 8 that Mr. Vachani "has **been personally involved** in all of Power's operations including the
 9 Facebook integration that occurred in December, 2008 that gave rise to this litigation." Dkt. 269
 10 at 7 (emphasis added).

11 As this Court and others have recognized, "a corporate officer or director is, in general,
 12 personally liable for all torts which he authorizes or directs or in which he participates,
 13 notwithstanding that he acted as an agent of the corporation and not on his own behalf." *Louis*
 14 *Vuitton Malletier, S.A. v. Akanoc Solutions, Inc.*, No. C07-03952 JW, 2010 WL 5598337, *14-15
 15 (N.D. Cal., March 19, 2010) (finding an individual liable along with his corporations where he
 16 was the "general manager and sole owner of the corporate Defendants," and "had nearly complete
 17 control over Defendants' operations") citing *The Committee for Idaho's High Desert, Inc. v. Yost*,
 18 92 F.3d 814, 823 (9th Cir. 1996). *See also F.T.C. v. Sili Neutraceuticals, L.L.C.*, No. 07 C 4541,
 19 2008 WL 474116, *3 (N.D. Ill. Jan. 23, 2008) (finding that an officer of defendant corporation
 20 who formulated, directed, controlled and participated in the acts or practices giving rise to CAN-
 21 SPAM liability by the corporation was individually liable under CAN-SPAM for such acts);
 22 *F.T.C. v. Phoenix Avatar, L.L.C.*, No. 04 C 2897, 2004 WL 1746698, *12-13 (N.D. Ill. Jul. 30,
 23 2004 (same).

24 "Cases which have found personal liability on the part of the corporate officers have
 25 typically involved instances where the defendant was the "guiding spirit" behind the wrongful
 26 conduct, . . . or the "central figure" in the challenged corporate activity." *Louis Vuitton*, 2010 WL
 27 5598337 at * 14 citing *Davis v. Metro Productions, Inc.*, 885 F.2d 515, 523 n. 10 (9th Cir. 1989).
 28 Here, it is readily apparent that Vachani was the "central figure" in Power's unlawful access to

1 and use of the Facebook website and should be held individually liable.

2 This proposition regarding individual liability by corporate officers for directing or
 3 authorizing unlawful Internet activities has been applied repeatedly in the CAN-SPAM, CFAA,
 4 and California Penal Code Section 502 context. *See, e.g. F.T.C. v. Sili Neutraceuticals, L.L.C.*,
 5 2008 WL 474116 at *3 (corporate officer was individually liable for corporation's CAN-SPAM
 6 violations); *F.T.C. v. Phoenix Avatar, L.L.C.*, No. 04 C 2897, 2004 WL 1746698, at *12-13
 7 (finding likelihood of success on CAN-SPAM Act claim against corporate officers for
 8 corporation's CAN-SPAM violations); *Hanger Prosthetics & Orthotics, Inc. v. Capstone
 Orthopedic, Inc.*, 556 F. Supp. 2d 1122, 1134-35 (E.D. Cal. 2008) (denying motion for summary
 9 judgment on CFAA and Penal Code Section 502 claims against CEO where CEO owned 1/3 of
 10 the co-defendant company, had significant responsibilities at the company, and where a
 11 reasonable jury could infer that CEO authorized, directed, or participated in the unlawful acts);
 12 *Omni Innovations, LLC v. Impulse Marketing Group*, No. C06-1469MJP, 2007 U.S. Dist. LEXIS
 13 51867, *3-7 (W.D. Wash. July 18, 2007) (finding CAN-SPAM Act claim sufficiently pled against
 14 owner of defendant corporation where owner was an officer, director, and majority shareholder of
 15 the corporation and complaint alleged that owner had "assisted" in transmitting spam messages).
 16 *See also Tagged, Inc. v. Does 1 through 10*, No. C09-01713 WHA, 2010 WL 370331 (N.D. Cal.,
 17 Jan. 25, 2010) (finding that Plaintiff properly stated a claim against both website and website
 18 operator under the CAN-SPAM Act and CFAA); *Facebook, Inc. v. Fisher*, No. C09-5842 JF
 19 (PSG), 2011 WL 250395 (N.D. Cal. Jan. 26, 2011) (same).

21 The undisputed facts, including Vachani's own admissions about his deeply personal role
 22 in controlling and directing the company's activities aimed at Facebook, firmly establish
 23 Vachani's individual liability. Vachani fully admits he was at all times [REDACTED]

24 [REDACTED] including with respect to the activities of the
 25 Power 100 Campaign underlying Facebook's CAN-SPAM claims. Cooper Decl. Ex. 2 (3/7/12
 26 Power Depo. Tr.) at 229:10-230:7. He admits that the Power 100 Campaign was his own idea,
 27 and that he was responsible for its implementation. Dkt. 275, at 10-11; Dkt. 232, Ex. 2 at 181:21-
 28 183:9; *id.* Ex. 5, Power's Response to Interrogatories Nos. 8-10, 16; Cooper Decl. Exs. 26

1 (12/16/08 Santos email chain with 12/2/08 Vachani email). He also admits [REDACTED]
 2 [REDACTED]
 3 [REDACTED]
 4 [REDACTED]
 5 [REDACTED] *Id.* (3/7/12 Power Depo Tran.) at 143:1-22;
 6 144:18-24; 159:22-161:3. *See also* Cooper Decl. Ex. 34 (12/26/08 email from S. Vachani to E.
 7 Santos re response to J. Cutler); Ex. 14 (1/9/12 Power Depo. Tr.) at 241:12-15; 241:20-242:3;
 8 242:5-13; Ex. 12 (7/20/11 Vachani Depo. Tr.) at 353:16-355:11; Ex. 22 at Power's
 9 Supplemental Response to Interrogatory No. 7; Ex. 4 (12/2/08 email from Vachani to Santos).
 10 Defendants further admit that Vachani was the Power employee or director responsible for
 11 creating the offending messages giving rise to CAN-SPAM liability. Dkt. 232, Ex. 5 at Power's
 12 Response to Interrogatory No. 9. Defendants separately admit that Vachani developed the
 13 technology at issue. Dkt. 232 at Power's Response to Interrogatory No. 8. Vachani himself
 14 admits that he directed and controlled each of the company decisions to circumvent Facebook's
 15 multiple blocks of Power's IP addresses which form the basis of the Court's rulings on
 16 Defendants' under the CFAA and Penal Code Section 502. Cooper Decl. Ex. 2 (3/7/12 Power
 17 Depo. Tr.) at 141:22-142:21; 230:23-231:4. In that role, Vachani specifically instructed Power
 18 employees to prepare for and circumvent the blocks that he correctly anticipated Facebook would
 19 implement, Dkt. 236, Ex. 6; Cooper Decl. Ex. 4 (12/2/08 email chain between S. Vachani & E.
 20 Santos).

21 After Facebook filed this lawsuit, Vachani also was the person who personally decided
 22 that Power would not implement a litigation hold preserving any potentially relevant
 23 documentation, and who later specifically authorized Power employees in April of 2011 to delete
 24 the company's database information reflecting how many electronic spam mail messages it
 25 initiated and/or sent to Facebook. Cooper. Decl. Ex. 14 (1/9/12 Power Depo. Tr.) at 83:23-84:11;
 26 Ex. 35 (11/9/11 email from T Fisher to M. Cooper); Ex. 36 (Ex. 193 from 1/9/12 Power Depo.
 27 Tr.).

28 As in *Davis v. Metro Productions, Inc* it is readily apparent that Vachani was the "central

1 figure" in Power's unlawful access to and use of the Facebook website, and that he should be held
 2 individually liable for the documented violations of the CAN-SPAM Act, the CFAA, and Penal
 3 Code Section 502 that he personally caused to occur.

4 **IV. CONCLUSION**

5 For these reasons, Facebook requests that Vachani be held jointly and severally liable with
 6 Power and that Facebook be awarded \$18,188,100 in damages for violating the CAN-SPAM Act,
 7 [REDACTED] for their violations of CFAA and Penal Code Section 502, that the Court declare that
 8 Facebook is entitled to injunctive relief, and any other further relief (such as punitive damages)
 9 deemed appropriate by the Court for the sake of example or punishing Defendants. Facebook
 10 further requests pursuant to 18 U.S.C. § 1030(g), 15 U.S.C. § 7706(g)(1), and California Penal
 11 Code § 502(e)(1) that following resolution of the two issues addressed in this Brief that the Court
 12 permit Facebook to submit a proposed Judgment and Permanent Injunction which will require
 13 Power and Vachani (and any related entities or companies under their control) to abide by
 14 Facebook's Terms of Use and to refrain from future violations of the relevant statutes.

15

16 Dated: March 30, 2012

ORRICK, HERRINGTON & SUTCLIFFE LLP

17

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By: /s/ I. Neel Chatterjee /s/
 I. Neel Chatterjee
 Attorneys for Plaintiff
 FACEBOOK, INC.

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